(6)

No. 95-157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

vs.

CHRISTOPHER LEE ARMSTRONG, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER*
TRACI L. HUAHN
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

*Attorney of Record

35 pp

QUESTIONS PRESENTED

1. What standard of evidence must a defendant meet before being entitled to discovery on a claim of discriminatory prosecution?

2. Does evidence that one group of defendants are all of the same race, with no showing of any comparison group of persons not prosecuted, meet this standard?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

vs.

CHRISTOPHER LEE ARMSTRONG, et al.,

Respondents.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of petitioner in the above-captioned case. Counsel for petitioner has consented to the filing of this brief, as have counsel for four of the five respondents. Counsel for respondent Armstrong (Mr. Dudley) has withheld consent by failure to respond to our numerous attempts to contact him over a period of nearly four weeks.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The criminal justice system does not have infinite resources. Every time the courts create new issues for litigation which are irrelevant to the central question of guilt or innocence, the system is further sapped of its strength and diverted from its central mission.

There can be no doubt that a true case of discriminatory prosecution is a grave injustice, but the rarity of proven cases indicates that real cases are also rare. If a low threshold showing is sufficient to force discovery and an evidentiary hearing on this question, then it threatens to become a routine diversion. The fight against crime is too important to be distracted by the routine pursuit of wild geese.

Acceptance of the minimal threshold showing endorsed by the Court of Appeals in the present case would be contrary to the interests CJLF was formed to protect.

For the foregoing reasons, *amicus curiae* requests for leave to file its brief.

December, 1995

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Statutes

State Statutes

Federal Rules of Court

Treatises

Miscellaneous

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

vs.

CHRISTOPHER LEE ARMSTRONG, et al.,

Respondents.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

SUMMARY OF FACTS AND CASE

Five defendants, all of whom are black, were charged in federal court with conspiracy to distribute cocaine base. Additional counts against some defendants included selling cocaine base and using a firearm in connection with a drug violation. The defendants claimed that the decision to prosecute them in federal rather than state court was racially discriminatory and requested discovery on this claim. The sole basis for the original request was a study by the Federal Public Defender showing that in each of the 24 cases of this type closed by that office in 1991 the defendant was black. *United States* v. *Armstrong*, 48 F. 3d 1508, 1511 (CA9 1995) (en banc).

No showing was made of a comparison group of others, similarly situated, who were prosecuted in state court instead. *Id.*, at 1527 (Rymer, J., dissenting). No explanation was given as to why the particular data set was chosen for the study. *Id.*, at 1530, n. 13.

Congress has established substantial penalties for persons trafficking in substantial quantities of cocaine base. Under 21 U. S. C. § 841(b)(1)(A)(iii), persons convicted of such an offense involving over 50 grams receive a minimum sentence of 10 years. An additional five years may be imposed for use of a firearm in connection with the offense. 18 U. S. C. § 924(c)(1).

Penalties under California law are generally less, but not necessarily as much less as the majority opinion below implies. California sentencing is a complex system of base terms and enhancements. The base term for possession of cocaine base for sale is, indeed, three, four, or five years. Cal. Health & Safety Code § 11351.5. The firearm enhancement statute, which is similar to 18 U. S. C. § 924(c), may well add up to five years in this case. See Cal. Penal Code § 12022.5(c).

It is difficult to say what other enhancements might apply in state court, as the factors involved there would not necessarily be alleged in federal court. For example, while 21 U. S. C. § 841 sharply distinguishes cocaine and cocaine base, it does not distinguish sales to or through minors from those involving only adults. California law punishes use of a minor for such sales by up to nine years in prison for the first offense, Cal. Health & Safety Code § 11353, and life in prison with a minimum of 17 years before parole for the third offense. Cal. Penal Code § 667.75. Selling cocaine to minors is a "serious felony," *id.*, § 1192.7(c), cl. 24, resulting in a five-year enhancement for each previous serious felony. *Id.*, § 667(a).

Thus, the maximum sentence in another sentencing system cannot be determined simply by looking up the term for the basic offense, as the Court of Appeals majority did in the present case, 48 F. 3d, at 1511, because it may depend on facts which the government had no reason to allege in the federal prosecution.

The district court granted the discovery motion and issued a sweeping discovery order, ordering the government to create compilations of data and answer specific questions. *Ibid.* The government moved for reconsideration and offered data and explanations in response to the claim of discrimination. *Ibid.*

The district court denied reconsideration and dismissed the action as a sanction for the government's refusal to comply with discovery. The dismissal was stayed pending appeal. The Ninth

Circuit originally reversed, finding that the defendants had not met the "colorable basis" test, 21 F. 3d 1431, but then granted rehearing en banc and affirmed.

SUMMARY OF ARGUMENT

Crack cocaine is a dangerous drug. Vigorous prosecution of its distributors is appropriate. Prosecution policies that focus on higher-level and better-organized distributors, in preference to low-level, individual user-dealers, are also appropriate and are fully consistent with the policy that Congress has recently established.

There is no general constitutional right to discovery in a criminal case, even when the underlying claim is a constitutional one. The present case should be expressly decided on nonconstitutional grounds, such as the Federal Rules of Criminal Procedure, to preclude any mistaken impression that the rule established is binding on the states or immune from Congressional modification.

The Federal Rules of Criminal Procedure, ignored by the opinion below, provide the structure for analysis. To be discoverable under Rule 16 or subject to subpoena under Rule 17, the material sought, if not privileged, must be relevant to a question actually at issue. This requires some preliminary showing.

Wade v. *United States* required a "substantial" showing. So did *Franks* v. *Delaware* in an analogous situation. This term is better than "colorable," which has caused confusion. A "substantial" threshold will raise the bar high enough to prevent meritless claims from becoming routine.

The showing in the present case was not even close to sufficient. For criminal gangs to be organized on ethnic lines is not unusual in America. For a gang or group of gangs to dominate a segment of crime in a particular area is also not unusual.

To make a substantial showing of discriminatory prosecution with statistics alone would require a comparison pool, controlled on all the major variables for legitimate differential treatment.

As a practical matter, most discriminatory prosecution cases will require direct evidence of discriminatory intent.

ARGUMENT

I. Crack is a dangerous drug, and vigorous enforcement against distributors is entirely appropriate.

President Clinton recently had this to say about crack cocaine:

> "Trafficking in crack, and the violence it fosters, has a devastating impact on communities across America, especially inner-city communities. Tough penalties for crack trafficking are required because of the effect on individuals and families, related gang activity, turf battles, and other violence." Statement by the President on Signing S. 1254 (Oct. 30, 1995).

Although cocaine is not physiologically addictive, it is psychologically addictive. Crack poses a greater danger of ensnaring casual users in the web of addiction because of the manner in which it is administered. U. S. Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy 181 (1995) (cited below as "USSC Report").

Cocaine has its effects only when it reaches the central nervous system, especially the brain. *Id.*, at 14. "The psychotropic feelings, described as 'stimulated' or 'high,' are correlated to the *rate* of increased concentration of cocaine in the blood, particularly *blood flowing to the brain*. The faster cocaine reaches the *brain*, the greater the intensity of the psychotropic effects." *Id.*, at 15-19 (emphasis added).

Cocaine can be taken four ways: injection, inhalation (smoking), insufflation ("snorting"), or ingestion. Cocaine base, or crack, is smoked, while powder is used the other three ways.[1] Inhalation provides by far the fastest "high," with the

1. Powder cocaine can be inhaled by "freebasing," but that dangerous practice has become relatively rare since the advent of crack. *Id.*, at 182, n. 1.

maximum psychological response only a single minute after use, four times faster than injection and twenty times faster than insufflation. *Id.*, at 18, Figure 4 ; *id.*, at 29, Table 2.

The difference between smoking and insufflation is the important comparison for considering the danger of addicting casual users, since few beginners will inject themselves. *Id.*, at 183, and n. 3. Cocaine powder lodges in the mucous membranes of the nasal cavity and is absorbed into the capillaries. This relatively slow route of administration results in a slower, lower, longer "high" and is less likely to result in drug dependence. *Id.*, at 28.

Along with the greater danger of addiction is the violent crime associated with crack cocaine distribution. "[T]he available research suggests that crack cocaine is significantly associated with systemic crime—that is, crime related to its marketing and distribution." *Id.*, at 185. The Sentencing Commission acknowledged that crack had "higher addictive qualities," *id.*, at 183, and was associated with "more criminal activity," *id.*, at 186, but found neither difference quantifiable. *Id.*, at 183, 186.

The Commission strongly recommended against the present 100-to-1 powder/crack ratio for mandatory minimum sentences, *id.*, at 198, but left open the possibility that some increased ratio was appropriate. *Id.*, at xv. The Commission subsequently decided against any differential by the barest of majorities. U. S. Sentencing Commission, Statement of the Commission Majority in Support of Recommended Changes in Cocaine and Federal Sentencing Policy, 57 BNA CrL 2128, 2130 (May 1, 1995). The dissenters believed that a differential was appropriate for distributors but not users. *Id.*, at 2131, and n. 2.

The elected branches of government emphatically agreed with the dissent. Public Law 104-38 (S. 1254) passed the Senate without recorded dissent. 141 Cong. Rec. S14782 (Sept. 29, 1995). It passed the House after a similar House bill had passed 332 to 83. 141 Cong. Rec. H10283-10284 (Oct. 18, 1995). As noted earlier, the President emphatically endorsed the bill's rejection of lower penalties for distributing crack cocaine.

Public Law 104-38 sends the issue back to the Sentencing Commission with a number of guidelines. Among these are that

people who traffic in crack should be sentenced more severely than those who traffic in powder cocaine, P. L. 104-38 § 2(a)(1)(A), and that those who operate organizations of five or more people in trafficking should be sentenced more severely. *Id.*, § 2(a)(1)(D)(xi).

Thus, both Congress and the Sentencing Commission dissenters agreed that the severe sentences imposed by federal law on mere users of crack cocaine, as opposed to traffickers, are inappropriate. An exercise of prosecutorial discretion which sought high federal penalties against organized traffickers, while relegating users and isolated, low-level dealers to the generally lesser penalties of state law, would not only be based on a legitimate law enforcement purpose; it would be in line with what Congress has since indicated is appropriate.

The U. S. Attorneys for the Central District of California and the District of Columbia have adopted a threshold of 50 grams for prosecution in federal court. USSC Report, *supra*, at 139, and n. 92; *id.*, at 143, and n. 94. This exercise of discretion amounts to a nullification of the much-criticized mandatory minimum sentence for 5 grams of crack, see 21 U. S. C. § 841(b)(1)(B)(iii), an amount likely to be possessed by a low-level user-dealer. See USSC Report, *supra*, at 171, 174.

In summary, then, crack cocaine is a particularly dangerous drug requiring stronger prosecution and penalties. Congress made that determination when it first distinguished crack from powder, and it has reaffirmed it in light of accumulated knowledge by large, bipartisan majorities and with the emphatic approval of the President. Prosecution policies which focus these penalties on dealers in substantial quantities who work in organized operations, as opposed to low-level, individual user-dealers, are entirely in accord with Congressional policy.

II. The rule to be established in this case should be expressly based on nonconstitutional sources.

"There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Weatherford* v. *Bursey*, 429 U. S. 545, 559 (1977). "[T]he Due Process Clause has little to say regarding the amount of discovery which the

parties must be afforded . . . ." *Wardius* v. *Oregon*, 412 U. S. 470, 474 (1973) (although disallowing one-way discovery).

The Court of Appeals in the present case asserted that a right of discovery exists without identifying its source. *United States* v. *Armstrong*, 48 F. 3d 1508, 1512-1515 (CA9 1995) (en banc). This is a dangerous omission in a case where the underlying claim is constitutional. Lower courts can slip too easily into the error of assuming that any rule which implements a constitutional right must itself be constitutional.

The distinction between constitutional and nonconstitutional rules is overlooked too easily and too often. See, *e.g.*, *Estelle* v. *McGuire*, 502 U. S. 62, 67-68, and n. 2 (1991). The distinction is a vital one, however, because rules promulgated under this Court's supervisory power are not binding on state courts. Just last term, this Court summarily reversed a grant of federal habeas relief to a state prisoner by a federal court which had paid insufficient attention to this basic distinction. *Goeke* v. *Branch*, 131 L. Ed. 2d 152, 158-159, 115 S. Ct. 1275, 1278 (1995).

The California Supreme Court explored the distinction between constitutional rules and discovery procedures in cases involving those rules in *People* v. *Luttenberger*, 50 Cal. 3d 1, 784 P. 2d 633 (1990). In that case, the defendant sought discovery under earlier state case law "for purposes of challenging the accuracy of statements made in an affidavit in support of a search warrant." *Id.*, at 6, 784 P. 2d, at 635. After the case authorizing such discovery, however, the people of the state had abolished the independent state exclusionary rule, so that the merits of the underlying claim would be governed by the federal rule of *Franks* v. *Delaware*, 438 U. S. 154 (1978). *Luttenberger*, 50 Cal. 3d, at 11, 784 P. 2d, at 639. The prosecution claimed that because *Franks* required a "substantial preliminary showing" for an evidentiary hearing, the state courts could not authorize discovery upon a lesser showing. *Id.*, at 12, 784 P. 2d, at 639.

The court rejected this argument. "[T]he fact that the discovery at issue may yield information to support a challenge to the affidavit and an eventual motion to suppress . . . does not

mean that the discovery is therefore also governed exclusively by federal principles." *Id.*, at 17, 784 P. 2d, at 643.

This Court, of course, can and has promulgated constitutional rules of procedure, binding on the states, to implement or protect a constitutional right. The advisement requirements for guilty pleas, *Boykin* v. *Alabama*, 395 U. S. 238 (1969), and in-custody confessions, *Miranda* v. *Arizona*, 384 U. S. 436 (1966), are examples. Decisions of this type are among the most controversial in criminal law and raise grave questions about this Court exceeding its constitutional authority and violating the people's right of self-government. See *Boykin*, 395 U. S., at 245 (Harlan, J., dissenting); *Miranda*, 384 U. S., at 525-526 (Harlan, J., dissenting). Creation of any more such rules would require compelling justification, to say the least.

The cases finding an affirmative constitutional duty to disclose evidence have been narrow and limited, as the quotes at the beginning of this part, *ante*, at 6, indicate. These cases were reviewed recently in *Kyles* v. *Whitley*, 131 L. Ed. 2d 490, 505-510, 115 S. Ct. 1555, 1565-1569 (1995). Briefly, the requirement has its roots in the rule of *Mooney* v. *Holohan*, 294 U. S. 103, 112 (1935) that the prosecution cannot knowingly use perjured testimony. *Napue* v. *Illinois*, 360 U. S. 264, 269 (1959) extended this prohibition to the prosecution's failure to correct testimony it knew was false but did not solicit.

Brady v. *Maryland*, 373 U. S. 83, 86-87 (1963) further extended *Mooney* to favorable evidence "material either to guilt or to punishment" even in the absence of the introduction of false evidence. *Giglio* v. *United States*, 405 U. S. 150, 153-154 (1972) applied *Brady* and *Napue* to a false statement by the prosecution's principal witness that he had not been given promises of leniency in return for his testimony. While not directly bearing on actual guilt or innocence, the credibility of the witness was an essential part of that determination. *United States* v. *Bagley*, 473 U. S. 667 (1985) defined *Brady* materiality with the same standard used for "prejudice" in ineffective assistance cases: "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.*, at 682.

The question remains open whether the "confidence in the outcome" test can ever be met on a collateral issue irrelevant to actual innocence. Justice Powell discussed the issue *sua sponte* in his concurrence in *Kimmelman* v. *Morrison*, 477 U. S. 365, 394-397 (1986), but the issue had not been raised by the parties and was not decided by the Court. *Id.*, at 397-398.

A claim of selective prosecution is similar to the exclusionary rule claim in *Kimmelman* in the sense that the defendant seeks acquittal not on the ground that he is innocent, but rather because he claims the government is guilty. This Court has not yet extended the constitutional mandate of *Brady* to encompass such claims, and this would be an inappropriate case in which to make an extension. The Court of Appeals did not state the basis of the authority to order discovery and did not consider the constitutional complexities of extending *Brady*.

Other than the narrow requirement of *Brady*, the reciprocity requirement of *Wardius*, *supra*, and the privilege against self-incrimination, *Malloy* v. *Hogan*, 378 U. S. 1, 6 (1964) (incorporation), the questions of how much discovery to make available in criminal cases and what mechanisms to provide have been decided separately by the federal government and each of the several States. See *Wardius*, *supra*, 412 U. S., at 474-475; *United States* v. *Augenblick*, 393 U. S. 348, 356 (1969). Within each sovereign, moreover, courts have made rules interstitially, but the legislative authority has had ultimate control. See *Palermo* v. *United States*, 360 U. S. 343, 353, n. 11 (1959) (Jencks Act). Any change to this allocation of authority, either state v. federal or legislative v. judicial, should be made only after the most careful and thorough consideration.

For the present case, it is sufficient and, *amicus* submits, necessary to state that preexisting case law does not recognize a constitutional mandate for the discovery sought here, and defendants have not asked this Court to recognize one. Whatever standard the Court may decide is proper should be based expressly on nonconstitutional sources, applicable solely to the federal courts and subject to Congressional modification. Creation of a constitutional rule can be considered if and when the need arises. See *Liverpool, New York and Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885).

III. The Federal Rules of Criminal Procedure provide the proper analytical structure.

Although there is some variation in the circuits, most of them cite *United States* v. *Berrigan*, 482 F. 2d 171 (CA3 1973) and *United States* v. *Berrios*, 501 F. 2d 1207 (CA2 1974) as the germinal cases in the area. See, *e.g.*, *United States* v. *Johnson*, 577 F. 2d 1304, 1308 (CA5 1978) (quoting *Berrios*); *United States* v. *Heidecke*, 900 F. 2d 1155, 1158-1559 (CA7 1990) (citing both, following *Berrios* for "colorable basis"); *United States* v. *Adams*, 870 F. 2d 1140, 1146 (CA6 1989) (following cases quoting *Berrios*). A close look at these cases is in order.

During the Vietnam War, the notorious Father Philip Berrigan and Sister Elizabeth McAlister exchanged letters planning a bizarre plot to kidnap Henry Kissinger and have him tried by a kangaroo court of "big wigs of the liberal ilk . . . [who would] also [be] kidnapped if necessary . . . ." *Berrigan*, *supra*, 482 F. 2d, at 178. They also planned to destroy parts of the Washington, D.C. utility system. *Id.*, at 179. These letters were smuggled in and out of Lewisberg Federal Penitentiary, in violation of 18 U. S. C. § 1791. *Id.*, at 173. The defendants claimed that they were prosecuted under this rarely enforced statute as political retaliation for their antiwar efforts. *Ibid.*

The procedure in the case was somewhat irregular; the discriminatory prosecution question was considered post-trial, *id.*, at 176, rather than pretrial. In the course of discussing the merits of the claim the court said, "Without denigrating the importance of the right of a person accused of crime to establish the presence of discriminatory prosecution, central to the issue must be *some initial showing* that there is a *colorable basis* for the contention." *Id.*, at 177 (emphasis added). The purpose of this showing is not entirely clear, since this statement occurs in Part I B of the opinion, discussing the trial judge's ruling on the merits, not discovery, the setting of a hearing, or the conduct of the hearing. On the merits, *Berrigan* holds, in essence, that people prosecuted for smuggling letters hatching bizarre and dramatic conspiracies against national security are not similarly situated with run-of-the-mill prison smugglers. See *id.*, at 179.

Part I C of the opinion, dealing with the conduct of the hearing, is most pertinent to the present case. The district court

refused to let Berrigan's counsel call the government's attorneys as witnesses and quashed a sweeping subpoena for "all documents in the government's files dealing with the decision to investigate and prosecute the case." *Id.*, at 180. The questioning of attorneys was disallowed on the grounds of separation of powers. *Id.*, at 180-181. The subpoena was quashed on similar grounds of executive privilege but also on the specific exemption from discovery in Rule 16(b) of the Federal Rules of Criminal Procedure. *Id.*, at 181.

Not long after *Berrigan*, this Court recognized that executive privilege is not absolute and must, in appropriate cases, give way to the judicial need to reach the truth. *United States* v. *Nixon*, 418 U. S. 683, 707 (1974). That case, however, involved a much stronger preliminary showing. See *id.*, at 700. In *Berrigan*, "appellants failed to meet their burden of proving a *colorable entitlement* to the defense of discriminatory prosecution so as to entitle them to the desired testimonial and documentary evidence." 482 F. 2d, at 181 (emphasis added).

Berrios, *supra*, 501 F. 2d, at 1211, adopted the phrase "colorable basis" from *Berrigan*, but placed a more coherent structure on the discovery issues. *Berrios*, like the present case, was an appeal by the government after dismissal of the case, following the government's refusal to turn over documents. *Id.*, at 1209.

Berrios was an official of the Teamsters Union despite his previous conviction of arson, in violation of 29 U. S. C. § 504. *Ibid.* This fact came to the U. S. Attorney's attention when Berrios was investigated for another labor-related arson. *Id.*, at 1210. Berrios claimed that "there are hundreds of unions with officers who have prison records," and that he was singled out because of his political and labor activity. *Id.*, at 1209-1210.

To decide what is discoverable and under what circumstances, the *Berrios* court turned to the Federal Rules of Criminal Procedure. First, *Berrios* noted, as *Berrigan* had, that the government's internal reports, memoranda, and other documents prepared by government agents are unequivocally exempt from discovery under Rule 16. 501 F. 2d, at 1211.

"Upon an *adequate preliminary showing* of relevancy, however, the district court may hold a hearing upon a motion

raising defenses or objections, [former] Rule 12(b)(4), F. R. Crim. P., and issue a subpoena directing the government to produce books, papers or records for introduction at the hearing, Rule 17(c), F. R. Crim. P." *Ibid.* (emphasis added).

Under Rule 17, materials may be subpoenaed which are not within the scope of Rule 16 discovery, but only if they are admissible evidence. *Bowman Dairy Co.* v. *United States*, 341 U. S. 214, 220-221 (1951). Use of the subpoena for "a fishing expedition to see what may turn up" is not allowed. *Id.*, at 221. If the subpoena calls for materials not admissible as evidence it is invalid. *Id.*, at 220-221.

Materials not protected from discovery by Rule 16(a)(2) are discoverable under Rule 16(a)(1)(C) only if they are "material to the preparation of the defendant's defense."[2] Materials sought under Rule 17 can be subpoenaed only if they are admissible, and they are admissible, among other requirements, only if they are relevant to a fact of consequence to the determination of the action and not privileged. Fed. Rules Evid. 401, 402, 501.[3] Under either rule, then, there must be a showing that discriminatory prosecution is a genuine issue in the case before any production can be ordered.

Regrettably, later decisions, including the present one, seem to have cut loose from the moorings of the Rules. In a case about pretrial discovery, the opinion below does not once mention Rule 16. In an earlier case, the Ninth Circuit held that it could not order production of material expressly exempted from discovery by Rule 16. *United States* v. *Nobles*, 501 F. 2d 146 (1974). This Court reversed only on the ground that Rule 16 is limited to *pretrial* discovery and does not extend to production orders *during* trial. *United States* v. *Nobles*, 422

2. The Rule provides two other grounds of discoverability, intended for use by the government at trial and obtained from or belonging to the defendant, neither of which is likely to apply in this context.

3. Professor Wright says that the use of Rule 17 to obtain materials not discoverable under Rule 16 is no longer necessary, 2 C. Wright, Federal Practice & Procedure—Criminal § 274, p. 158 (2d ed. 1982), at least as to materials held by the government. *Id.*, at 48 (1995 Supp.).

U. S. 225, 234-236 (1975). The *Nobles* Court implicitly agreed with the Ninth Circuit's basic premise that Rule 16's exclusions from discovery, particularly the broadly defined work-product exclusion, are controlling pretrial, and the district judge has no authority to order discovered what Congress has protected. See also *United States* v. *Hearst*, 412 F. Supp. 863, 866 (ND Cal. 1975).

Review of the scope of the order issued by the district court in the present case is not within the question presented, see Pet. for Cert. i, but the order is a significant indication of how far that court has strayed from the Rules. The district court ordered the government to create new documents, rather than disclose existing ones, and effectively ordered the government to answer interrogatories. See *id.*, at 3. Yet it is well established that these kinds of discovery are not available in criminal cases. 2 C. Wright, Federal Practice and Procedure—Criminal § 254, pp. 64-66, nn. 12, 18 (2d ed. 1982).

In short, then, a return to *Berrios*' emphasis on the Federal Rules of Criminal Procedure is in order. If the appropriate threshold showing has been made, nonprivileged documents can be discovered under Rule 16(a)(1)(C), to the extent they are not precluded by Rule 16(a)(2). If a showing sufficient for an evidentiary hearing has been made, nonprivileged documents admissible in evidence can be subpoenaed under Rule 17. The remaining question is the definition of that threshold showing.

IV. *Wade* and *Franks* provide the appropriate standard.

On one point, the opinion below is correct. "[T]he meaning of 'colorable basis' . . . has proved elusive . . . ." *United States* v. *Armstrong*, 48 F. 3d 1508, 1513 (CA9 1995). An earlier Ninth Circuit precedent used these words to describe " a 'high threshold' that should rarely justify discovery." *Ibid.* (quoting *United States* v. *Bourgeois*, 964 F. 2d 935, 940 (1992)). The en banc court in the present case used the same words to describe a standard so low that discovery can be ordered every time gangs

of a particular ethnic group corner a particular racket.[4] A standard which generates that much confusion should be reconsidered. See *Solorio* v. *United States*, 483 U. S. 435, 450 (1987).

In *Wade* v. *United States*, 504 U. S. 181, 186 (1992), the Court accepted Wade's concession "that a defendant has no right to discovery or an evidentiary hearing unless he makes a 'substantial threshold showing.' " A point conceded and accepted may have more precedential force than a question merely lurking in the record, which has none. See *Webster* v. *Fall*, 266 U. S. 507, 511 (1925). Yet, at least arguably, it has less force than a decision on a point actively contested. See *Brecht* v. *Abrahamson*, 123 L. Ed. 2d 353, 368, 113 S. Ct. 1710, 1718 (1993). Precedent or not, *amicus* believes that the standard stated in *Wade* is a better formulation than the term "colorable basis," and it is a closer approximation to what the courts using the latter term really meant in the cases prior to the present one.

For a precedent on a closely analogous question which *was* actively contested, we turn to *Franks* v. *Delaware*, 438 U. S. 154 (1978). *Franks* involved the question of whether a defendant could challenge a facially valid warrant on the ground that the affiant lied to the issuing magistrate. The Court held that an evidentiary hearing on that issue was required only upon a "substantial preliminary showing." *Id.*, at 155-156. "Preliminary" is functionally the same as "threshold" in this context, and hence the *Franks* standard is the same as the *Wade* standard.

One of the considerations which convinced the *Franks* Court to require such a showing applies equally to the present case. A *Franks* hearing, like a discriminatory prosecution hearing, diverts resources from "the pressing question of guilt or innocence." *Id.*, at 167. "The weight of criminal dockets, and the need to prevent diversion of attention from the main issue of guilt or innocence, militate against such an added burden on the trial courts." *Ibid.* A "sensible threshold showing" was required to keep this burden within bounds. *Id.*, at 170.

---

4. See *post*, at 19, for a discussion of why this is not unusual.

This consideration is even more important today than it was when *Franks* was decided. Justice is sacrificed daily on the altar of limited resources. The odious practice of plea bargaining has become the principal method of disposing of cases. See U. S. Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics—1993, p. 536 (1994). Civil cases of great importance to their parties sit on the back burner as criminal cases get priority. See, *e.g.*, Commission on the Future of the California Courts, Justice in the Balance—2020, p. 147 (1993). Courts should think long and hard before tossing another brick on this staggering camel's back.

Concerns about a flood of frivolous motions are not idle speculation. Such a flood has followed in the wake of *Strickland* v. *Washington*, 466 U. S. 668 (1984). A recent study found ineffective assistance claims raised in 45 percent of noncapital federal habeas petitions, V. Flango, Habeas Corpus in State and Federal Courts 47 (1994), although less than one percent of such claims were granted. *Id.*, at 62, Table 17. In capital cases, where petitioners generally have counsel, the situation is worse, not better. "An unfortunate offshoot of death penalty litigation has been the recurrent demonization of prior counsel . . . ." *Williams* v. *Calderon*, 52 F. 3d 1465, 1470, n. 3 (CA9 1995).

America's criminal justice system does not need another resource-gobbling side issue to be alleged by criminals, caught red-handed, who have nothing else to argue.[5] The threshold showing must be high enough that the claim cannot be lightly made.

The court below, regrettably, appears to have had exactly the opposite goal in mind. "Defendants attempting to show a colorable basis that warrants discovery can only be expected to make good faith efforts to obtain whatever evidence is *readily* available . . . ." *United States* v. *Armstrong*, *supra*, 48 F. 3d, at 1514 (emphasis added). "Nor are defendants required to compile facts which are not *easily* obtainable by them." *Ibid.* (emphasis added).

---

5. "Mules seldom have a viable defense, generally having been corralled red-hoofed with large quantities of illegal drugs at or near the border." *United States* v. *Redondo-Lemos*, 955 F. 2d 1296, 1298 (CA9 1992).

Where is the compelling social need to pave a yellow brick road for these claims? Is discriminatory prosecution rampant in the land, such that new remedies must be created or existing ones expanded to address it? Cf. *Mapp* v. *Ohio*, 367 U. S. 643, 651 (1961) (exclusion needed because other remedies had failed); *Irvin* v. *Dowd*, 366 U. S. 717, 730 (1961) (Frankfurter, J., concurring) (broad federal habeas needed because, at the time, state courts routinely disregarded fundamental unfairness). That case has not been made.

Statistics on allegedly discriminatory application of the criminal law can be gathered and have been gathered from public records. See, *e.g.*, Baldus, Pulaski & Woodworth, Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience, 74 J. Crim. L. & Criminology 661, 680-681 (1983). The present case involves allegations of prosecution in state versus federal court of persons represented by the public defender. A comparison pool, see *Armstrong*, *supra*, 48 F. 3d, at 1530 (dissent), could be found in the case files of persons represented by the county public defenders of the seven counties comprising the Central District of California. See 28 U. S. C. § 84(c) (boundaries of CD Cal.); Cal. Govt. Code § 27700 (establishment of public defender by county). If this task is too large, both samples could be limited to offenses occurring in Los Angeles County. This information is no more available to the federal prosecutor than it is to the federal defender. In addition to their own files and those of the county public defenders, state court records are generally open to the public. See *Copley Press, Inc.* v. *Superior Court*, 6 Cal. App. 4th 106, 111-112, 7 Cal. Rptr. 841 (1992).

Considering both the separation of powers problem, see *Wayte* v. *United States*, 470 U. S. 598, 607-608 (1985), and the resource allocation problem, intelligible standards need to be set. There are up to three different standards to be considered: (1) a standard to obtain discovery; (2) a standard to warrant an evidentiary hearing; and (3) a standard to establish the defense and obtain dismissal of the prosecution.

The final standard was firmly established in *Wayte*, 470 U. S., at 608. The defendant must "show both that the [prosecution policy] had a discriminatory effect and that it was motivated by a discriminatory purpose."[6]

With the elements of the defense established, the next question is whether the standard for discovery should be any lower than the standard for a hearing. Some cases have held that the two standards are the same. See *United States* v. *Gordon*, 817 F. 2d 1538, 1540 (CA11 1987); *United States* v. *Greenwood*, 796 F. 2d 49, 52 (CA4 1986). Others have held that different standards apply. See, *e.g.*, *United States* v. *Heidecke*, 900 F. 2d 1155 (CA7 1990).

In some contexts, there is considerable force to the argument that a lower threshold should be set for discovery, with the fruits of the discovery used to meet the higher burden for an evidentiary hearing. *People* v. *Luttenberger*, 50 Cal. 3d 1, 18, 784 P. 2d 633, 643-644 (1990) established such a rule in a Fourth Amendment context where compliance with the discovery was simple and where there was no issue of intrusion into the discretionary functions of another branch of government.[7]

Significant differences exist in the discriminatory prosecution context. By definition, discriminatory prosecution occurs across the whole class of comparable cases and not just in one isolated case. In a Fourth Amendment context, an individual police officer could make up a nonexistent confidential informant, and no one would ever know. In the present context, a standing policy of targeting one racial group while treating another leniently would be difficult to conceal for long. Employees working on the cases could see the pattern, and nearly every office of any size has some disgruntled employees or former employees. Also, as noted *ante*, at 16, a significant portion of

---

6. The latter element is self-proving if the prosecution uses "an overtly discriminatory classification." See *id.*, at 608, n. 10.

7. *Luttenberger* is also distinguishable as the product of a court-created regime of liberal defense discovery quite different from the federal rules, see 5 B. Witkin & N. Epstein, Cal. Criminal Law §§ 2493-2499, pp. 2995-3000 (2d ed. 1989), and subsequently abolished by the people. See *id.*, § 2498D, p. 19 (1995 Supp.); Cal. Penal Code § 1054.5; *In re Littlefield*, 5 Cal. 4th 122, 129, 851 P. 2d 42, 47 (1994).

the evidence is in public records. The need for discovery is reduced in this context.

On the other side of the ledger, the damage is largely complete upon discovery. Like an unreasonable search, the discovery itself is the injury, not the later use of the products in court. Cf. *Linkletter* v. *Walker*, 381 U. S. 618, 637 (1965). In the present context, the expense of gathering documents and data from a large number of files and the intrusion of defense counsel's prying eyes on the prosecution's inner workings are the principal injuries to be avoided. Once the resources have been spent and the privacy of the office breached, an actual evidentiary hearing would be a relatively minor additional intrusion.

For these reasons, a single standard should apply for both discovery and an evidentiary hearing. Further, the Ninth Circuit's earlier opinion was correct when it said that "some evidence" is not enough, and a "high threshold" is necessary. *United States* v. *Bourgeois*, 964 F. 2d 935, 939 (1992). The phrasing of *Franks* and *Wade*, that the showing be "substantial," comes closer to the mark than the confusing term "colorable" and should be adopted.

V. The showing in the present case is insufficient.

The showing in the present case requires only brief discussion. Previous attacks upon crack sentencing laws have stressed that the bulk of the violators of this particular drug law are black. The Minnesota Supreme Court sustained an equal protection challenge to the constitutionality of similar state law on this basis. *State* v. *Russell*, 477 N. W. 2d 886, 887 (1991). The *Russell* court noted that 96.6 percent of cocaine base defendants in Minnesota were black, while 79.6 percent of powder cocaine defendants were white. Similar proportions have been found in other cases. See *United States* v. *Simmons*, 964 F. 2d 763, 767 (CA8 1992); Shein, Racial Disparity in "Crack" Cocaine Sentencing, 8 Crim. Just. 28, 32 (Summer 1993).

Despite all this, the Court of Appeals majority in the present case states that any assumption that the defense's statistics in this

case represent demographic reality rather than racist policy "would be accepting unwarranted racial stereotypes." *United States* v. *Armstrong*, 48 F. 3d 1508, 1517, n. 6 (CA9 1995). This statement is the rhetorical equivalent of chemical warfare. With neither precedent nor experience to support its position, the majority tries to poison the dissent's ground by branding it "racist." This ploy is as unconvincing as it is regrettable.

A commitment to racial equality does not require that we blind ourselves to racial reality. In truth, there is nothing unusual about gangs of a particular ethnic group dominating a particular segment of organized crime in a given region at a given time. The Mafia, the tongs, and the Nuestra Familia have been comprised primarily, if not exclusively, of people of one ethnic group. See A. Bequai, Organized Crime 19-25 (1979). When such a gang or group of gangs is successful enough to dominate a "racket" for some period, then it follows that most prosecutions for that crime in that period will be of defendants of one ethnic group.

The Sentencing Commission describes three types of distributors for cocaine: "freelance individuals, relatively small, non-gang groups, and relatively large, urban street gangs." USSC Report, *supra*, at 76. Beyond question, it would be a perfectly proper exercise of prosecutorial discretion to focus the most intense efforts on groups rather than individuals and on large groups rather than small groups. Who are the large groups in the Los Angeles area? "The Crips and the Bloods are rival gangs in Los Angeles whose membership comprises primarily Black youth." *Id.*, at 80.

The Court of Appeals majority essentially proceeds upon a presumption of homogeneity. We are supposed to assume that all crime is spread exactly evenly through all ethnic groups until the government shoulders the burden of proving otherwise. *Armstrong*, *supra*, 48 F. 3d, at 1517, n. 6. Real life is not like that.

This Court has held that the use of a presumption which is not grounded in reality is so grossly unfair that it violates the Due Process Clause. *Leary* v. *United States*, 395 U. S. 6, 36 (1969). The people are also entitled to due process of law. *Stein* v. *New York*, 346 U. S. 156, 197 (1953), overruled on other

grounds in *Jackson* v. *Denno*, 378 U. S. 368, 391 (1964). A presumption of homogeneity in a country we know is heterogeneous,[8] particularly in its criminal gangs, is fundamentally unfair to the people and denies them due process of law.

For this reason, a showing of discriminatory impact must include a comparison group of people who received more lenient treatment and who do not differ from the allegedly targeted group on any legitimate basis for differential treatment. No such showing was made in the present case.

The Court of Appeals majority gave the defense complete control over which data set would be used for the threshold showing. The Federal Public Defender's Office chose its own cases closed in 1991 as the study group. When the government responded with a broader group, the majority dismissed the response, saying "None of the cases [shown by the government], however, fell within the parameters of the [defense's] study." 48 F. 3d, at 1517. As the dissent notes, it is quite possible that various parameters were tried and the set that gave the most favorable numbers for the argument was chosen. *Id.*, at 1530, n. 13. Random variation, especially in sets as small as 24 cases, makes such dishonesty far too easy.

The additional declarations made to "bolster" the initial statistical study, 48 F. 3d, at 1511, were extraordinarily weak. First there was counsel's declaration of rank hearsay from a halfway house coordinator concerning his experience in treating *addicts*. *Id.*, at 1511-1512. Because federal policy is targeted at distributors rather than users and lower-level sellers, see P. L. 104-38, § 2(a)(1)(B) (Oct. 30, 1995), the population of addicts is utterly irrelevant. To the extent the halfway house coordinator opined on the population of dealers, *Armstrong*, 48 F. 3d, at 1512, even if he had the expertise to make such a statement, it does not distinguish low-level individuals from more organized operations. The defense attorney's declaration of conversations and conclusions about "cocaine base offenses," *ibid.*, does not show that the state cases are comparable on all legitimate

8. See *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 266, n. 15 (1977).

criteria, or indeed on any criterion other than a sweeping category of offenses.

Can statistics alone ever make a case of discriminatory prosecution? *Wayte* v. *United States*, 470 U. S. 598, 609 (1985) cites *Arlington Heights*, *supra*. That case states the answer.

> "Sometimes a clear pattern, *unexplainable* on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); [citations]; *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960). The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern *as stark as that in Gomillion or Yick Wo* impact alone is *not* determinative, and the Court must look to other evidence." 429 U. S., at 266 (emphasis added; footnotes omitted).

Yick Wo did not simply show that all 200 of the wooden laundry petitions from Chinese applicants were denied; he also showed that all but one of the applications by white persons were granted. 118 U. S., at 359. Gomillion did not simply show that the Tuskegee gerrymander excluded all but four or five of the 400 black voters; he also showed it included all the white voters. 364 U. S., at 341.

Defendant's showing clearly does not come anywhere close to these. However, the showing is not offered as a proven case but rather as the basis for discovery. If a disparity as stark as *Yick Wo* or *Gomillion* is required for *proof* of discriminatory intent, how stark of a disparity will suffice for a "substantial preliminary showing"?

For the preliminary showing to serve its function, defendants must be required to show different treatment of similarly situated groups and to substantially (not conclusively) negate the principal valid reasons why the groups might be treated differently.

First, the allegedly disadvantaged sample group must be identified. Defendants should explain why this group was selected, *e.g.*, because records of this group were available and a comparison pool was available. It would also be helpful to state what other pools were considered, why they were rejected, and any preliminary results from them. This would help negate suspicion that the pool was chosen because it coincidentally

yielded the numbers most favorable to the argument. Cf. *Armstrong*, *supra*, 48 F. 3d, at 1530, n. 13 (dissenting opinion).

Second, a comparison pool is essential. Reliance on general population statistics and an unsupported presumption of homogeneity would be fundamentally unfair to the people. See *ante*, at 19.

Third, the two pools must be shown to be comparable on the major legitimate reasons for the charging decision, including government knowledge of the offense, strength of the case,[9] quantity in drug cases, prior criminal history, firearm use or other violence, and level of organization.

Making a substantial showing of discriminatory prosecution through statistics alone is a daunting task, to be sure. Yet the complexity of the prosecution decision, see *Wayte*, *supra*, 470 U. S., at 607, renders any lesser showing void of probative value. For example, in *McCleskey* v. *Zant*, 580 F. Supp. 338 (ND Ga. 1984), the model that supposedly showed "a statistically significant race of the victim effect at work on the prosecutor's decision-making" was, in reality, "*totally invalid* for it contain[ed] no variable for strength of the evidence . . . ." *Id.*, at 367 (emphasis added). Another study in the case did contain data on strength of the evidence. *Id.*, at 355. That study showed "no statistically significant race of the victim effect . . . in the prosecutor's decision . . . ." *Id.*, at 367.[10] Statistical studies with major variables missing simply show nothing.

The very few defendants who have actually made a preliminary showing of discriminatory prosecution have typically done so with direct evidence from employees or former employees of

9. This is generally not a problem in drug possession cases unless there is a Fourth Amendment issue.

10. On appeal, the Eleventh Circuit and this Court chose to decide the case on the facts alleged, rather than the facts found by the trier of fact. *McCleskey* v. *Kemp*, 481 U. S. 279, 289, 291, n. 7 (1987). That departure from normal appellate procedure has led to the widespread but mistaken belief that Baldus had proved his statistical case. See *Callins* v. *Collins*, 127 L. Ed. 2d 435, 445, 114 S. Ct. 1127, 1135 (1994) (Blackmun, J., dissenting) (describing Baldus study as "highly reliable" and "staggering evidence").

the government. See *United States* v. *Adams*, 870 F. 2d 1140, 1144 (CA6 1989); *United States* v. *P. H. E., Inc.*, 965 F. 2d 848, 851 (CA10 1992). As a practical matter, defendants seeking to make discriminatory prosecution claims would generally be wise to invest in some old-fashioned detective work, rather than relying solely on statistics. Making even a preliminary case on numbers alone is difficult enough that some statements from present or former insiders will usually be necessary.

The need for evidence beyond numbers presents a significant hurdle, but not an impossible one. Tolerance for intolerance is vastly lower in America today than it was in the days of *Yick Wo* or *Gomillion*. Diversity within prosecuting offices is far greater. If a racist conspiracy were truly being perpetrated over an extended period by a U. S. Attorney's Office, it is probable that some employee or former employee would eventually be willing to come forward and expose it. See *ante*, at 17. If such showings are rare, it is probably because such conspiracies are rare.[11]

We do not pretend that such evidence will *always* be available. A threshold showing requirement raises the risk that some discriminatory conspiracies might remain covered up. Any system of criminal justice necessarily tolerates some risk. For example, the standard of proof beyond a reasonable doubt, rather than proof beyond *any* doubt, creates some risk of conviction of an innocent person. The conviction of one guilty person while other guilty persons go free, even if discriminatory, is a matter of far lesser magnitude. We cannot afford to pursue thousands of phantoms to catch one real violation. A substantial showing requirement will limit litigation of this issue to cases where there is a significant possibility of a real violation.

The showing in the present case is far from "substantial," having no comparison group for statistics and no direct evidence of discriminatory intent. Discovery should not have been ordered.

11. If there is something less than racist conspiracy, such as a race-neutral policy with an unintended disparate impact, that does not constitute a defense to prosecution. See *Wayte*, *supra*, 470 U. S., at 610.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be reversed.

December, 1995

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation